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No. 99 1078

IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an officer's knowing and deliberate violation of *Miranda* renders the defendant's statements inadmissible for all purposes, including impeachment, even if the statements were voluntary.

2. Whether the rule stated above is dictated by United States Supreme Court precedent within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989).

3. Whether a defendant's voluntary statements, taken in violation of *Miranda* but admissible because they contradict the defendant's trial testimony, may be used only to determine the credibility of the defendant's testimony, such that a limiting instruction is required even where the defendant rejects such an instruction.

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

PEGGY KERNAN, *Petitioner,*

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BOBBY HENRY, *Respondent.*

OPINION OR JUDGMENT BELOW

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") issued May 26, 1999 (177 F.3d 1152) and amended on denial of rehearing on October 25, 1999 (__ F.3d __) (Appendix C). The decision reversed the judgment of the United States District Court for the Eastern District of California that denied respondent's petition for writ of habeas corpus. Respondent is a prisoner in state custody pursuant to a judgment of conviction and sentence in the Superior Court of California, County of Sacramento.

Petitioner has included the following orders and opinions as Appendices: (A) the Magistrate Judge's Findings and Recommendations (No. CIV S-95-2055 DFL); (B) the District Court's Order (No. CIV S-95-2055 DFL); (C) the Ninth Circuit's published opinion, as amended upon denial of rehearing, in Henry v. Kernan, No. 98-15768; (D) the Ninth Circuit's unpublished order staying issuance of mandate for 90 days to enable the filing of a petition for writ of certiorari; and (E) a copy of

the transcript of the police interview that is the subject of this petition.

STATEMENT OF JURISDICTION

The Ninth Circuit denied rehearing and filed an amended decision on October 25, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of way or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

California Evidence Code section 1235:

> Evidence of a statement by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

STATEMENT OF THE CASE

On September 6, 1988, respondent Bobby Henry, armed with two handguns, entered the office of real estate broker Bill Withrow, where he shot him numerous times, killing the victim as he sat behind his desk. Respondent immediately walked to a pay telephone, called the police and told them what he had done. Respondent was taken to the sheriff's office where he was placed in an interview room. After being advised of his *Miranda* rights, he requested counsel. Instead of stopping the interview, one of the detectives asked: "Why did you shoot him anyway?" Respondent explained: "Cheated me out of money. I was loosing [sic] my property." He guessed that he had lost about $50,000. It is the admissibility and use of these statements that is in question here.

Thereafter, respondent again requested counsel, saying: "Am I supposed to keep talking without an attorney?" One of the detectives responded: "Listen, what you tell us we can't use against you right now . . . We'd just would [sic] like to know."[1/] Respondent continued to answer questions. A transcript of the full interview is in Appendix E.

The trial prosecutor conceded that the officers violated respondent's *Miranda* rights when they ignored his request for counsel and continued questioning, but contended that his statements were admissible to impeach if the respondent testified at the trial. At a trial court hearing on admissibility, respondent's counsel stipulated that the officers did not use physical force or threats and agreed that the issue was whether his statements were "involuntary based upon false inducements and/or some false promises." The state trial court found that the

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1. For convenience, petitioner will refer to these comments as "the alleged inducement or promise," the term used by defense counsel at trial.

officers "intentionally went beyond the law" when they ignored respondent's request for counsel, but that there were no "false promises, deceit, or inducement that rises to the level of coercion." The court found that respondent's statements were voluntary beyond a reasonable doubt and were admissible for impeachment.

The respondent did testify at trial, claiming that he acted in self defense. His police interview was admitted for impeachment. The trial court offered a limiting instruction, but the respondent rejected the offer. During closing argument, the prosecutor argued that the police interview contradicted respondent's self defense claim in that respondent never mentioned self defense. The prosecutor also argued that the interview helped show motive, namely, that the victim was cheating respondent out of money. Respondent did not object to this argument. Respondent was convicted of second degree murder with a firearm enhancement and sentenced to state prison for a term of fifteen years to life, plus a two-year enhancement.

This judgment was affirmed by the state Court of Appeal, which independently concluded that all of the respondent's statements during the police interview were voluntary. Referring to the officer's alleged inducement or promise, the court found it was not "of a type which would be reasonably likely to procure a false confession." More importantly, the court held that respondent's most damaging statement, that he believed the victim was cheating him, was made *before* the alleged inducement or promise, so that any error in admitting the remainder of his interview was harmless. The California Supreme Court denied review of this decision.

Respondent next petitioned the United States District Court for the Eastern District of California for a writ of habeas corpus. Permission to proceed in forma pauperis was granted December 5, 1995. The matter was referred to a Magistrate Judge, who, on June 6, 1997,

issued findings, inter alia, that respondent's free will was overborne by the alleged inducement or promise. The Magistrate Judge recommended granting the writ because the prosecutor used the interview to help rebut respondent's self defense claim.

Petitioner objected to these findings and recommendations and, on November 21, 1997, United States District Judge David Levi denied the writ, agreeing with the state appellate court that the most damaging statement, that the victim was cheating respondent out of money, was made *before* the alleged inducement or promise, and that in any event it was not the type of inducement or promise which would produce involuntary statements.

Respondent appealed and, on May 26, 1999, the Ninth Circuit issued a published decision (177 F.3d 1152) holding that *all* of respondent's statements were involuntary because of the alleged inducement or promise, which the court characterized as "slippery and illegal," coupled with what the court perceived as respondent's subsequent incoherence and emotion.[2] Therefore, the court held that it was error to admit the interview into evidence and that the error was prejudicial because the interview tended to show that the killing was intentional and not in self defense. Without distinguishing between respondent's statements before and after the alleged inducement or promise, the court effectively prohibited use at retrial of any part of the interview.

On June 9, 1999, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. On October 25, 1999, the Ninth Circuit denied rehearing but amended its earlier published decision. In the amendment, the court rejected petitioner's contention that respondent's post-*Miranda* statements did not become

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2. Petitioner disagrees with this characterization, as did the state courts and the United States District Judge.

inadmissible, if at all, until *after* the alleged inducement or promise. The court announced two rules, which present the issues raised in the present petition for certiorari. First, the court held that the knowing and deliberate violation of *Miranda*, which occurred when officers ignored respondent's first request for counsel, rendered all of the remaining statements involuntary as a matter of law so that none of the statements were admissible for impeachment. Second, while the interview was admitted for impeachment, the trial court failed to give a limiting instruction, so that it may have been used substantively. Implicitly, the court announced a rule that trial courts are required to give a limiting instruction, sua sponte, even when the defendant rejects such an instruction.

On November 3, 1999, the Ninth Circuit granted petitioner's application to stay issuance of the mandate for ninety days to permit the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has announced two new rules of criminal procedure by which it purports to bind state courts. First, the Ninth Circuit has announced a new exclusionary rule with respect to statements taken in violation of *Miranda*. If a defendant can show that officers knew they were violating *Miranda*, the defendant's statements are inadmissible for any purpose, including impeachment, whether or not they were actually voluntary. This new exclusionary rule conflicts with the teachings of this Court, including *Harris v. New York*, 401 U.S. 222 (1971) and its progeny, with the Fourth Circuit's decision in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *cert. gr.* __U.S.__ (12/6/99), with a recent decision of the California Supreme Court, and with common sense. In effect, it overrules *Harris* in the Ninth Circuit. At the very

least, this rule was not clearly announced and was not clearly dictated by precedent at the time respondent's conviction became final, and it should not be announced or applied in this habeas corpus proceeding. This threshold *Teague* issue has been raised consistently in the lower federal courts, beginning with the objections to the Magistrate Judge's findings and recommendations and throughout Ninth Circuit proceedings, yet it has never been acknowledged or addressed.

Second, the Ninth Circuit has found reversible error because, although respondent's post-*Miranda* statements were admitted for impeachment, no limiting instruction was given and there is a possibility that the jury may have considered them for the truth of the matter asserted. The Ninth Circuit ignored the fact that the state trial court offered a limiting instruction, but defense counsel rejected the offer. Thus, the rule announced in this case appears to be that state trial courts must instruct sua sponte and even over objection that post-*Miranda* statements admitted for impeachment may only be considered for that purpose.

Not only was this instructional issue never raised and briefed,[3] the rule requiring a limiting instruction was not clearly dictated by the teachings of the Supreme Court of the United States, as required by *Teague*. Moreover, petitioner contends that the Constitution does not prohibit substantive use of statements taken in violation of *Miranda*, so long as the statements are not admitted until after the defendant testifies in a way that is inconsistent

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3. It was not until the Ninth Circuit amended its decision on denial of rehearing that it stated the rule being challenged here. Although use of the statements by the prosecutor had been mentioned by the parties in the context of assessing prejudice, the question of whether it was reversible error for the trial court to omit a limiting instruction was not presented or exhausted in state court, nor was it an issue before the District Court.

with his police interview. In other words, assuming statements are voluntary, a *Miranda* violation gives the defendant the power to determine whether or not his police interview will be admitted, but once the defendant unlocks the door on admissibility by testifying in a way that is inconsistent with his police interview, his statements become admissible for all purposes just like any other prior inconsistent statement.

ARGUMENT

I.

THE ADMISSIBILITY OF A STATEMENT TAKEN IN VIOLATION OF *MIRANDA* DEPENDS UPON WHETHER THE STATEMENT WAS VOLUNTARY, NOT UPON WHETHER THE OFFICERS KNEW THEY WERE VIOLATING *MIRANDA*

The Ninth Circuit has ruled that, under the Fifth Amendment, voluntary statements taken in violation of *Miranda* are inadmissible for any purpose, including impeachment, if officers knowingly and deliberately violated *Miranda* by ignoring the suspect's request for counsel. This rule is contrary to decisions of this Court and to the public policy announced in those decisions.

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the court ruled that a defendant's statements are inadmissible if they are taken in violation of his Sixth Amendment right to counsel, which the court held attaches during custodial interrogation when police have focused upon the individual. The next year, in *Miranda v. Arizona*, 384 U.S. 436 (1965), the court held that, in order to protect the Fifth Amendment self-incrimination rights of a custodial suspect, police must inform him of certain rights, including the right to have counsel present during questioning, and that if they fail to give those warnings or ignore a proper invocation of those rights, any statement the suspect makes thereafter is presumed to be involuntary and is admissible in the prosecution's case in chief. The court noted that underlying the Fifth Amendment is historical concern about coerced admissions and confessions. See also *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ["Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion . . ."]. The

presumption of involuntariness and attendant exclusionary rule were designed to motivate officers to comply with *Miranda*.

The scope of the exclusionary rule was subsequently clarified in *Harris v. New York*, 401 U.S. 222. While a defendant whose *Miranda* rights were violated may prevent the prosecution from using his post-*Miranda* statements during the case in chief, he may not convert the violation into a license to commit perjury, and his statements are admissible for impeachment "provided that the trustworthiness of the evidence satisfies legal standards." *Id.* At 224. It has always been understood that the test of admissibility for impeachment is whether the statement was voluntary, since the essence of Fifth Amendment protection is protection against coercion. *Michigan v. Tucker*, 417 U.S. at 440, quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956). Thus, the presumption of involuntariness created by a *Miranda* violation is rebuttable, and if rebutted, the defendant's statement is admissible to impeach his trial testimony.

The Ninth Circuit has expanded upon the exclusionary rules of *Miranda* and *Harris* by holding that statements are inadmissible for any purpose if there is proof that the officers knowingly and deliberately violated *Miranda,* whether or not the statements were actually voluntary. By grounding its ruling on the Fifth Amendment, the Ninth Circuit has necessarily held that a knowing and deliberate violation of *Miranda* renders any subsequent statement involuntary as a matter of law, without regard to whether it was actually coerced. In effect, the court has ruled that a defendant may use an officer's deliberate violation of *Miranda* as a shield against impeachment and therefore testify falsely with impunity.

This decision is in direct conflict with the policy underlying *Harris* and appears to be contrary to other decisions of this Court. For example, in *Oregon v. Haas*, 420 U.S. 714 (1975), this Court decided that, for purposes

of the *Harris* rule, it makes no difference whether the defendant's statements were made before required warnings were given, as in *Harris*, or afterwards, as in *Haas*. The court noted that the full deterrence value of the *Miranda* exclusionary rule remains the same whether or not the officer knows the warnings are defective. *Id.* at 723. The court rejected the argument that statements should be excluded for all purposes, including impeachment, where the officer knows the suspect has requested counsel, but proceeds with questions anyhow because he has nothing to lose. Instead, the court noted that it had already struck the appropriate balance between deterrence and proper impeachment when it decided *Harris*. The court concluded by saying:

> If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises *measured by the traditional standards for evaluating voluntariness and trustworthiness.*

Id. at 723 [emphasis added.].

Similarly, in *Michigan v. Tucker*, 417 U.S. at 447, the court noted:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence [in the case in chief] gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

In *Tucker*, the court held that the defendant's constitutional rights were not violated by the admission of the testimony of a witness discovered through the defendant's voluntary statements, even though officers failed to inform the defendant of his right to counsel prior

to his making those statements. The court found that arguments in favor of admitting the testimony were "quite strong" and included the important public policy interests of allowing the trier of fact to consider relevant and trustworthy evidence, as well as society's interest in the effective prosecution of criminals. *Id.* at 450-451. The court expressly rejected a contention that a different and more comprehensive exclusionary rule should apply where there have been "lawless invasions of the constitutional rights of citizens." *Id.* at 450, fn. 25.

The present case is not different. Prior to amending its decision, the Ninth Circuit held that *all* of respondent's statements were involuntary because of the officer's alleged inducement or promise. However, respondent's most incriminatory statement was made *before* the alleged inducement or promise, a point dealt with by the Ninth Circuit in the amended portion of the decision, filed October 25. There, the court purported to recognize that the *Harris* decision might ordinarily control, but for the fact that the officers deliberately violated *Miranda*. The court held that the knowing and deliberate *Miranda* violation rendered respondent's statement involuntary as a matter of law. Petitioner contends that this ruling violates previous rulings of this Court and that it is inconsistent with the public policies discussed in the decisions. It is also inconsistent with the recent holding of the California Supreme Court in *People v. Peevy*, 17 Cal.4th 1184 (1998), where the state court unanimously concluded that statements otherwise admissible under

Harris are not made inadmissible because officers knew they were violating *Miranda* when they took the statements.[4]

There is a significant danger if the Ninth Circuit's decision is allowed to stand. Not only will relevant and otherwise admissible evidence be kept from juries, but the exclusionary rule itself will likely be expanded to cover virtually all *Miranda* violations. What apparently triggered the exclusionary rule in this case, according to the Ninth Circuit, was the officer's admission that he knew that, under *Miranda*, he should have ceased questioning when the respondent requested counsel. In the next case, a defendant will argue that the officer's admission is irrelevant if it appears that the officer reasonably *should have known* that the interrogation had to stop as soon as he requested counsel. Since the *Miranda* rules themselves are well known, it will be relatively easy to demonstrate that a trained officer reasonably should have known that his actions violated *Miranda*, and therefore that his continued questioning was a knowing and deliberate violation of *Miranda*. Hence, in the Ninth Circuit, *Harris* will no longer be the rule because it will have been effectively overruled by *Henry*.

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4. The rule is also inconsistent with *United States v. Dickerson*, 166 F.3d at 667, where the court held that a confession is admissible if voluntary and that it is not made inadmissible by a *Miranda* violation. On December 6, 1999, this Court announced that it has granted *certiorari* to review that decision.

II.

AT THE VERY LEAST, IT IS IMPROPER TO ANNOUNCE AND APPLY A NEW EXCLUSIONARY RULE UPON COLLATERAL REVIEW OF A FINAL STATE DECISION

In *Teague v. Lane*, 489 U.S. 288, 310 (1989), this Court made it clear that federal courts may not generally announce or apply new constitutional rules of criminal procedure to cases which became final before the new rule was announced. See also *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). The court has explained that a new rule is one which "breaks new ground," "imposes a new obligation on the States or the Federal Government" or was not "dictated by precedent existing at the time the defendant's conviction became final." *O'Dell v. Netherland*, 521 U.S. 151, 156-157 (1997); see also *Stringer v. Black*, 503 U.S. 222, 227 (1992).

Respondent's conviction became final in 1992. On July 8, 1992, the California Supreme Court denied review of the Court of Appeal decision affirming respondent's conviction and sentence. The time for filing a petition for writ of certiorari expired later that year, on or about October 6, 1992.

At the time of respondent's trial and throughout his appeal, the legal landscape included *Miranda, Harris, Tucker, Haas,* and similar cases which prohibited use of statements during the case in chief if they were taken in violation of *Miranda*, but which allowed the statements to be used for impeachment, provided they were voluntary. No decision of the Supreme Court of the United States required the total exclusion of voluntary statements where officers deliberately violated *Miranda*, nor did any decision suggest that a deliberate violation rendered the statements involuntary as a matter of law. Hence, it was never

argued on direct appeal that a deliberate violation rendered the statements inadmissible. Instead, it was argued that the defendant's statements were involuntary because they were a product of the alleged inducement or promise; respondent never contended that his pre-promise statement that the victim was cheating him was involuntary and inadmissible.

As noted in the preceding argument, this Court has never held that in-custody statements are inadmissible for any purpose if officers deliberately violate *Miranda*. Certainly, it cannot be said that such a rule should have been apparent to all reasonable jurists (see *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997), for as noted, the teachings of this Court lead in the opposite direction. In 1998, approximately six years after respondent's case became final, the California Supreme Court reviewed the decisions of this Court in *People v. Peevy*, 17 Cal.4th 1184, and concluded that a deliberate violation did not make the defendant's statement inadmissible for impeachment. Even the Ninth Circuit in the present case could point only to its own 1992 decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), a civil rights case in which the court found actual coercion.[5] Both the California Supreme Court in *Peevy* (*id.* at 1202) and the District Judge in his order in the present case properly recognized that *Cooper v. Dupnik* was inapplicable.

Petitioner repeatedly raised the *Teague* bar in this case. This Court has often said that *Teague* is a "threshold question" which must be addressed before a court considers the merits. *Lambrix* at 524; *Goeke v. Branch*, 514 U.S. 115, 117 (1995); *Teague* at 300.

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5. See also *California Attorneys for Criminal Justice v. Butts*, __ F.3d __, 1999 W.L. 1005103 (9th Cir. 1999) where the Ninth Circuit held that a deliberate *Miranda* violation involves a denial of Fifth Amendment self-incrimination rights and is actionable under the Civil Rights Act.

However, the Ninth Circuit did not even acknowledge this issue in its decision, much less explain why it did not feel bound by *Teague*. Even if the Ninth Circuit believes, albeit erroneously, that its own decisions bind state courts within the meaning of *Teague* (see *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998) and *Moore v. Calderon*, 101 F.3d 261 (9th Cir. 1997)), the *Teague* issue should have been addressed because it was timely raised and because other courts had found *Cooper* inapposite. In this case, the Ninth Circuit plainly violated the rule of *Teague v. Lane* and it was improper both to announce and apply the rule that statements taken after a knowing and deliberate violation of *Miranda* are inadmissible for any purpose, even if they were clearly voluntary.

III.

STATE TRIAL COURTS SHOULD NOT BE CONSTITUTIONALLY REQUIRED TO INSTRUCT THE JURY TO LIMIT ITS CONSIDERATION OF IMPEACHMENT EVIDENCE

In order to grant the writ of habeas corpus in the present case, the Ninth Circuit had to find that it was prejudicial error to admit respondent's statements to police. In its initial decision, the court did not distinguish statements made before the alleged inducement or promise from statements made thereafter. The court found prejudice because the prosecutor used the respondent's statements to show that respondent never told detectives that he killed the victim in self-defense and that he could not explain why he took his guns with him when he went to the victim's office. The court noted that respondent's statement provided motive.

In its amendment upon denial of rehearing, the court discussed only that portion of respondent's statement that preceded the alleged inducement or promise. It was in that portion of the statement that respondent told detectives that he believed the victim was cheating him out of money. In addition to ruling that the statement was inadmissible because the officer deliberately violated respondent's *Miranda* rights, the court found that the error was prejudicial because, even though it was admitted for impeachment, the trial court did not give a limiting instruction, thus inviting substantive use of the statement. The Ninth Circuit did not acknowledge that the trial court offered an instruction and the defense declined, or that the defense did not object during the prosecutor's closing argument. Therefore, the holding of the Ninth Circuit is that trial courts are obligated to instruct sua sponte that statements admitted for

impeachment under *Harris v. New York* may only be considered for that purpose and may not be considered for the truth of the matter.

Initially, petitioner contends that this instructional issue was not properly before the Ninth Circuit, since it had never been raised, either in state or federal court. As a basis for reversal, the issue arose for the first time in the Ninth Circuit's amended decision on denial of rehearing. In addition, because petitioner believes the instructional rule announced by the Ninth Circuit is a new rule within the meaning of *Teague v. Lane,* it may not be announced or applied in this habeas corpus proceeding. More importantly, petitioner contends that error was not committed in this case and that it is wrong to limit a jury's consideration of voluntary statements to impeachment, particularly where the defense rejects an instruction and no objection is raised to the prosecutor's closing arguments.

Petitioner contends that *Miranda* and *Harris* describe rules of admissibility, not rules governing the use of evidence that is properly admitted. There is nothing inherently wrong with using a defendant's own voluntary statements to prove guilt. In *Oregon v. Elstad*, 470 U.S. 298, 305 (1984), this Court said:

> Voluntary statements "remain a proper element in law enforcement." *Miranda v. Arizona,* 384 U.S. at 478. Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. *United States v. Washington,* 431 U.S. 181, 187 (1977).

The exclusionary rule of *Miranda* contradicts and frustrates these principles unless it is interpreted as a rule of admissibility rather than a rule limiting use. Petitioner

contends that is a proper interpretation of *Miranda* and its progeny.

In *Michigan v. Tucker*, 417 U.S. at 452, the court noted that the exclusionary rule of *Miranda* "enabled [defendant] to block admission of his own statements . . ." in the prosecution's case in chief. This is true even if it is shown, as it was in this case, that the defendant's statements were voluntary and trustworthy. Under *Harris*, however, the defendant loses his ability to block admission if he testifies in a way that is inconsistent with his police interview. Once it is determined that a defendant's statements are voluntary and trustworthy, and that they are admissible because they are inconsistent with his trial testimony, there is no constitutional reason why use of the statements must be limited to impeachment. The purpose of the exclusionary rule is satisfied by giving the defendant the key to admissibility, and the important public policy favoring substantive use of his voluntary and trustworthy admissions is served by allowing them to be used in any manner the jury sees fit if the defendant elects to throw away the key and allow the statements to be admitted.

Petitioner acknowledges statements in *Harris* and other cases that imply that a limiting instruction is required. In *Harris*, the trial court gave a limiting instruction, so the issue of whether such an instruction was constitutionally required never arose. Similarly, dicta in *Richardson v. Marsh*, 481 U.S. 200, 206-207 (1987) that a limiting instruction is required is not persuasive because the court merely cited *Harris* for the principle.

As the Ninth Circuit noted in its decision, California Evidence Code section 1235 generally permits use of a prior inconsistent statement not only to contradict trial testimony, but also for the truth of the matter stated. The constitutionality of section 1235 was expressly upheld by this Court in *California v. Green*, 399 U.S. 149 (1970), which reversed a decision of the California Supreme Court holding that section 1235 violated the Sixth Amendment

confrontation right. The court held that where the declarant testifies and has a chance to defend or explain the prior inconsistent statement, the Confrontation Clause does not prevent its admission for substantive use. *Id.* at 164. The court went on to note that, when those conditions are satisfied, "we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given." *Id.* at 168.

While there is admittedly a distinction between the Sixth Amendment issue considered in *California v. Green*, where the prior inconsistent statement was made by a witness, and the Fifth Amendment issue in this case, where the statement was made by the defendant, the distinction is irrelevant once the statement is found to be voluntary and trustworthy, as well as inconsistent with the defendant's trial testimony. *Harris* makes the defendant's prior statement admissible, and Evidence Code section 1235 allows it to be used to prove the truth of the matter, just as any other voluntary admission or confession. For this reason, the Ninth Circuit was wrong in announcing a new rule that a limiting instruction must be given sua sponte in all cases when a defendant's prior inconsistent statement to an officer is admitted under *Harris*.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision in *Henry* announced both new and incorrect rules of criminal procedure which are inconsistent with prior decisions of this Court and with a recent decision of the California Supreme Court. This case present an opportunity to resolve important federal constitutional questions concerning the admissibility and use of statements taken in violation of *Miranda*. It also presents an opportunity to remind lower federal courts of the limitations of collateral review. Petitioner respectfully urges this Court to grant certiorari to resolve the issues of law presented herein.

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Respectfully submitted,

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